Supreme Court, U.S.
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No. 99-1238

In The

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

v.

TONY BRUCE BENNETT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT

ALAN S. FUTERFAS*
ELLEN B. RESNICK
LAW OFFICES OF
ALAN S. FUTERFAS
260 Madison Avenue
New York, NY 10016
(212) 684-8400

JOHN H. BLUME
CORNELL LAW SCHOOL
110 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

KEIR M. WEYBLE
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S QUESTION PRESENTED

Is a state post-conviction application "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions, if it is procedurally barred from review under state law?

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STATEMENT OF THE CASE

The Crime and the Trial

In the early morning of February 1, 1983, New York City police officers Kevin Perham and Willard Cleaver observed a blue Chevrolet Nova occupied by four black men parked on a street in Queens County, New York. JA 19. The officers had no contact with the Nova or its occupants before leaving to respond to another call. *Id.* When that call proved unfounded, the officers returned to the Nova and observed that one of its occupants had left the vehicle. *Id.* The officers pulled up behind the Nova as it stopped to let a second passenger out. *Id.* When the officers turned on their red police lights, the car, now carrying two occupants, sped away. *Id.* Believing the car to be connected with "some robberies in two precincts," Perham and Cleaver pursued it. JA 48-49. Shots were exchanged but no one was injured. JA 49. The officers soon cornered the Nova behind a school and its two remaining occupants fled through a field. *Id.*

Respondent, Tony Bennett, and his co-defendant, Derrick Chisholm, were arrested twenty-two days later and charged with offenses relating to the chase. JA 49. In March, 1984, Bennett and Chisholm were tried jointly in the Supreme Court of New York, Queens County. JA 123. The prosecution's case rested entirely on the identification testimony of officers Cleaver and Perham, both of whom testified that they picked Bennett out of a lineup on February 23, 1983.[1] JA 19-20. Bennett's fingerprints

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[1] The unreliability of eyewitness identification is well documented. *See, e.g.*, Gary L. Wells & Eric P. Seelau, *Eyewitness*

were not found anywhere in or on the Nova, JA 20, and the prosecution offered no physical evidence against him. Officer Collins, who assisted in the investigation, testified that both officers told him two days after the incident that they were uncertain whether they could identify the perpetrators. JA 20.

Julian Ishmael testified that Bennett was with him at Ishmael's home at the time of the incident. JA 21. Ishmael explained that as he and Bennett were about to leave Ishmael's home, they heard shots and saw flashing lights. They went to the street corner to see what was happening. JA 21. Half an hour later, they returned to Ishmael's house, where Bennett spent the night. *Id.* After Bennett's next witness, Elias Mahamed, was placed under oath, the prosecutor objected to his testimony on the ground that Bennett had failed to include Mahamed in his notice of alibi. *Id.* Bennett argued that Mahamed was not an alibi witness, but was being called to corroborate Ishmael's testimony because he could verify that he saw Ishmael and Bennett together in the crowd after the chase. JA 22. Although the prosecution was made aware of Bennett's intention to call Mahamed one week prior to trial, the trial court ruled that Bennett's failure to include Mahamed in the notice of alibi precluded his testimony. *Id.*

Identification: Psychological Research and Legal Policy on Lineups, 1 Psychol. Pub. Pol'y & L. 765 (1995); *see also United States v. Wade*, 388 U.S. 218 (1967). The problems are compounded when the witness and the suspect are members of different races. *See, e.g.*, Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934, 937-51 (1984).

Bennett also testified and confirmed that he had been at Ishmael's home at the time of the chase. JA 22. He explained that he and Ishmael heard shots as they were leaving the house. *Id.* They went to the scene and saw police officers crouched behind car doors with guns drawn. JA 22-23. Bennett maintained that he spoke to Mahamed, who was watching the scene from his front door. Bennett said he subsequently returned to Ishmael's house, where he spent the night. JA 23.

On March 27, 1984, Bennett was found guilty of two counts of Attempted Murder in the First Degree, Criminal Possession of a Weapon in the Second Degree, two counts of Reckless Endangerment in the First Degree, Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Motor Vehicle. JA 24. His co-defendant, Chisholm, was found not guilty on all counts. *Id.* At Bennett's September 25, 1984 sentencing hearing, the trial judge said he was "quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was and the police were just as firmly convinced that Chisholm was [involved] as [they were that] Bennett was [involved]." JA 25. Bennett was sentenced to concurrent indeterminate prison terms of from fifteen years to life on the attempted murder counts, and to lesser terms on the remaining counts, to run consecutively to the greater terms. JA 25-26.

The Direct Appeal

Bennett raised six claims on direct appeal, one of which was that he had been deprived of his rights under the federal and state constitutions to present a defense

when the trial judge precluded Elias Mahamed's testimony for failure to comply with the state's alibi notice requirement. JA 26-28. On March 2, 1987, the Appellate Division affirmed the judgment of conviction, agreeing with Bennett that the trial court erred in precluding Mahamed's testimony, but finding the error harmless "in light of the overwhelming evidence of guilt." *People v. Bennett*, 512 N.Y.S.2d 472, 473 (2d Dept. 1987). Bennett's March 19, 1987, application for leave to appeal to the New York State Court of Appeals was denied on May 7, 1987. *See People v. Bennett*, 517 N.Y.S.2d 1034 (1987). His conviction became final on August 5, 1987, when the time for filing a petition for writ of certiorari with this Court expired.

State Post Conviction Proceedings

On May 28, 1991, Bennett moved, pursuant to New York CPL § 440.10, to vacate his convictions on grounds of newly discovered evidence and ineffective assistance of counsel. JA 104. The trial court denied the motion in a written decision dated August 2, 1991. JA 95. Bennett did not seek leave to appeal.

Bennett filed a second *pro se* application for post-conviction relief pursuant to New York CPL §§ 440.10 and 440.30 on June 5, 1995. JA 121. This application clearly stated that the submission was necessary to satisfy the exhaustion prerequisite to pursuing federal habeas corpus relief, *see* JA 114, and alleged that Bennett's Sixth and Fourteenth Amendment rights were violated when the trial court barred the testimony of Elias Mahamed. JA 115. Bennett also maintained the prosecutor committed

misconduct by withholding his objection to Mahamed's testimony until after the witness was placed under oath in the presence of the jury. JA 115; 119. Bennett further alleged that his right to be present at all material stages of trial was violated when his pre-trial *Sandoval* hearing[2] went forward in his absence. JA 120.

The state opposed the claims in Bennett's 1995 application on both procedural and substantive grounds. With regard to Bennett's claim that the trial court erred in barring Mahamed's testimony, the state relied exclusively on CPL § 440.10(2)(a),[3] contending that this "precise issue" had already been resolved on direct appeal. JA 128. In response to the prosecutorial misconduct claim, the state argued both that Bennett had not established facts demonstrating prosecutorial misconduct and that because the Appellate Division had already found the error in excluding Mahamed's testimony harmless, Bennett was unable to establish prejudice. The state defended against the right to be present at the *Sandoval* hearing claim on several grounds. First, it argued that the trial record established that Bennett had in fact been present at

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[2] In New York, a "*Sandoval* hearing" is a pre-trial proceeding in which a trial court makes "an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility." *People v. Sandoval*, 314 N.E.2d 413, 416 (N.Y. 1974) (citations omitted).

[3] CPL § 440.10(2)(a) provides that a "court must deny a motion to vacate a judgment when: (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue[.]"

the hearing. JA 129. Second, it argued that even if the record did not conclusively demonstrate Bennett's presence, it contained facts sufficient to have permitted review on direct appeal, thereby making collateral relief unavailable pursuant to CPL § 440.10(2)(c).[4] *Id.* Third, the state contended that, "even if the record was not sufficient to permit review on direct appeal, [Bennett] could have caused such facts to appear on the record," and his claim should therefore fail under CPL § 440.10(3)(a).[5] JA 130. Fourth, the state claimed that "even if this is a purely off-the-record claim, it is still procedurally barred because [Bennett] could have raised this issue in his original 440 motion, but unjustifiably failed to do so," thereby subjecting the claim to denial pursuant to CPL

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[4] CPL § 440.10(2)(c) provides that, "Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when: . . . (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him[.]"

[5] CPL § 440.10(3)(a) provides, in relevant part, that, "Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when: (a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal."

§ 440.10(3)(c).[6] *Id.* Finally, the state set forth a defense on the merits. *See* JA 130-131. In his *pro se* response to the state's opposition, Bennett again indicated his intent to pursue federal habeas corpus relief following the exhaustion of state court remedies. *See* JA 139 (citing "Title 28 USC § 2254(b)"); JA 141 (referring to "the reviewing Federal District Court").

On November 30, 1995, the trial court denied Bennett's motion in a four word oral decision: "The motion is denied." JA 143. As the state acknowledges in its brief, despite Bennett's repeated written requests, a written version of the court's decision has never been served on Bennett, rendering him unable to seek leave to appeal. *See* Pet. Brf. 4; *see also* N.Y. Ct. Rules § 670.12(b)(1) & (b)(2)(vi).[7]

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[6] CPL § 440.10(3)(c) provides that, "Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when: . . . (c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so."

[7] In a ruling not challenged by the state in this proceeding, the Second Circuit held that Bennett's 1995 application "was and is still 'pending' in the New York courts for purposes of the AEDPA tolling provision." *Bennett v. Artuz*, 199 F.3d 116, 120 (2nd Cir. 1999). The claims presented in the federal habeas petition at issue in this case are therefore unexhausted.

Federal Habeas Corpus Proceedings

District Court

On February 11, 1998, Bennett filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He raised three claims: (i) that he was deprived of his right to a fair trial, to present witnesses in his defense, and to confront witnesses, as a result of the trial court's preclusion of Mahamed's testimony; (2) that his absence from the *Sandoval* hearing violated his right to due process; and, (3) that he was deprived of his right to effective assistance of counsel as a result of his trial attorney's failure to object to improper remarks made by the prosecutor during summation. *See* Appendix to Second Circuit Brief of Appellant (hereinafter "Sec. Cir. App.") at A10-A11

Two weeks later, on February 25, 1998, the district court dismissed the petition *sua sponte*. The court's order of dismissal relied exclusively on then-prevailing Second Circuit precedent permitting dismissal of habeas petitions in cases that became final prior to the AEDPA's effective date if they had not been filed within "a reasonable time." Sec. Cir. App. at 17-18 (citing *Peterson v. Demskie*, 107 F.3d 92 (2nd Cir. 1997)).[8]

Noting that Bennett's petition was filed "one year and nine months after the effective date of AEDPA and

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[8] *Peterson*'s "reasonable time" standard was subsequently clarified in *Ross v. Artuz*, 150 F.3d 97, 103 (2nd Cir. 1998), to afford prisoners whose convictions became final prior to the AEDPA's effective date one full year in which to file a petition for federal habeas corpus relief.

more than ten years after his conviction became final," the court found the petition "clearly untimely under *Peterson*." Sec. Cir. App. at 18.

Second Circuit

The Second Circuit reversed the judgment of the district court. Assuming the truth of Bennett's representations concerning the state court's failure to serve him with a written order denying his 1995 post-conviction relief application, the court of appeals held, in relevant part, that Bennett's 1995 application "was and is still 'pending' in the New York courts for purposes of [§ 2244(d)(2)]," and therefore, "the one-year grace period he has to file his petition under *Ross* [*v. Artuz, supra*] has not yet commenced." *Bennett v. Artuz*, 199 F.3d 116, 120-121 (2nd Cir. 1999). The court of appeals further rejected the state's contention that Bennett's 1995 application was not "properly filed" within the meaning of § 2244(d)(2) because the claims it contained "were 'subject to a mandatory procedural bar under state law.' " *Id.* at 121. The court explained that "[d]etermining whether a pending-state-court motion is procedurally barred . . . is beyond the appropriate role of a federal court in addressing whether a state post-conviction application was properly filed." *Id.* at 122. The court further observed that, "[h]ad Congress 'intended to condition tolling on a state court finding of merit, it could have drafted § 2244(d)(2) to exclude frivolous petitions . . . [and to] clearly withh[o]ld tolling from prisoners filing . . . procedurally barred claims.' " *Id.* (quoting *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999)) (all but first modification by court of appeals). Finally, after rejecting the state's argument

that a narrow construction of "properly filed" would generate "a 'paper flow' by state prisoners" attempting to extend their federal habeas filing dates, *id.* at 122, the court adopted the straightforward rule that § 2244(d)(2)'s "properly filed" requirement is satisfied when "an application for state post-conviction relief recognized as such under governing state procedures has been filed." *Id.* at 123.

SUMMARY OF ARGUMENT

Under the plain language of § 2244(d)(2), a "properly filed application" for state post-conviction review is exactly that: an application that satisfies the state's filing requirements. This rule is both workable and true to the statutory language. Adhering to § 2244(d)(2)'s focus on the filing status of a prisoner's "application," rather than on the eligibility for merits review of individual claims contained within that application, minimizes and simplifies the review a federal court must undertake to determine the timeliness of a habeas petition. This understanding of "properly filed application" poses no legitimate threat to states' interest in expediting post-conviction litigation; it does nothing to lessen non-capital prisoners' incentives to seek speedy resolution of their claims for relief, nor does it deprive the states of the mechanisms they have long employed to force death-sentenced prisoners to proceed through the capital appeals process.

The state's proposed rule – that an application for post-conviction relief is not "properly filed" within the

meaning of § 2244(d)(2) if it is "mandatorily procedurally barred under state law" – is unfaithful to the statutory language, casually converting "properly filed application" into "application raising claims that are not procedurally barred." It is also unworkable in that it affords prisoners no meaningful guidance as to when a state application for collateral relief will trigger tolling under § 2244(d)(2), and requires federal habeas courts to undertake a complex analysis of the state court record, the governing state court rules of procedure, and the merits of the underlying case merely to answer the threshold question whether a habeas petition is timely.

The state's proposed rule would spawn widespread confusion and increased costs to the judiciary. Prisoners seeking to minimize the risk of untimeliness would file federal habeas petitions containing unexhausted claims, thereby placing federal habeas courts in the position of deciding in the first instance whether a state court would be likely to consider those claims on the merits. Moreover, giving meaning to the state's rule and its exceptions would require the development of an entirely new and complex area of federal habeas corpus doctrine. The net result of the state's mandatory procedural bar rule would be to increase the work loads of state and federal judges with no corresponding benefits, not even to the states.

Finally, even under the state's proposed rule, Bennett's 1995 application for state post-conviction relief must be deemed "properly filed." Under New York law, each of the procedural defenses the state raised to Bennett's claims required the state post-conviction court to make one or more substantive determinations before being authorized to deny Bennett's application. This,

combined with the fact that the state also defended against Bennett's claims in part on the merits, makes it impossible to conclude from the state court's four-word oral denial of Bennett's application that his claims were "mandatorily procedurally barred" under New York law.

ARGUMENT

A. Introduction.

Every year, thousands of state prisoners seek collateral review of their convictions. Due to the exhaustion requirement, most inmates first pursue state post-conviction remedies. Many of these individuals, however, will eventually file a federal petition for writ of habeas corpus. Because AEDPA's new statute of limitations requires that most federal petitions be filed within one year of the petitioner's conviction becoming final on direct review, subject to a tolling provision for "properly filed applications" for state post-conviction review, prisoners who are contemplating seeking federal habeas review will inevitably ask the following question: what is a "properly filed application"? Without knowing the answer to that basic question, they will be uncertain as to when they must file in federal court in order to satisfy the statute of limitations. Thus, the impact of the Court's decision in this case will be far reaching, and it is essential to the orderly administration of justice that the Court announce a precise, workable rule that is understandable to *pro se* inmates, to counsel, and to federal judges. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985) ("the legislative purpose to create an effective remedy [through § 1983]

for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters"); *see also Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150 (1987) (quoting *Wilson*, 471 U.S. at 272) ("a uniform statute of limitations is required [in RICO context] to avoid intolerable 'uncertainty and time-consuming litigation' "). Fortunately, a clear-cut, easily administrable rule is evident from the statutory language.

B. The plain language of § 2244(d)(2) permits tolling of the limitations period during the pendency of any state application satisfying the prerequisites that must be met before a state court will allow the application to be filed.

The state's brief foregoes any meaningful analysis of the statutory language in favor of a generalized discussion of Congress' intent to accelerate habeas corpus litigation through the AEDPA. But this Court has made clear that "the starting point for interpreting a statute is the language of the statute itself," and that, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also* (*Michael*) *Williams v. Taylor*, 120 S.Ct. 1479, 1487 (2000) *citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("We start, as always, with the language of the statute").

This case turns on the meaning of § 2244(d)(2)'s phrase, "properly filed application." "[W]hen construed

in the relevant context,"[9] § 2244(d)(2)'s "properly filed" clause functions as the modifier for "one grammatical subject," the word "application." *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 79-80 (1991). Because "words and people are known by their companions," *Gutierrez v. Ada*, 120 S.Ct. 740, 744 (2000), ascertaining the meaning of the modifier "properly filed," requires first that its subject, "application," be defined.

While § 2244(d)(2) does not expressly define "application," other subdivisions of § 2244 provide clear evidence of Congress' understanding of this term. *See Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), ("Statutory language must be read in context"); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (a word in a statute "gathers meaning from the words around it"). Specifically, § 2244(b)(1) and (2) refer to "[a] claim presented in a . . . habeas corpus application," indicating that Congress defines an "application" as a document or pleading "in" which a "claim" is "presented" to a court for collateral review. *See also* § 2244(b)(4) ("any claim presented in a[n] . . . application").[10] Because "nothing in the structure

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[9] The full text of § 2244(d)(2) provides as follows: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

[10] This definition is equally applicable to words such as "petition" and "motion," which are often used interchangeably with "application." *Compare, e.g.*, 28 U.S.C. § 2262(b)(1) ("a habeas corpus application under section 2254") *with* § 2262(b)(3) ("a habeas corpus petition under section 2254"); *compare*

or purpose of [§ 2244(b) and (d)] suggests a reason for interpreting these adjacent subsections differently," *Barnhill v. Johnson*, 503 U.S. 393, 406 (1992), it is appropriate to apply the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning," *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Applying this rule of statutory construction, "application," as it is used in § 2244(d)(2), refers simply to the document in which a state prisoner sets forth his claims for post-conviction relief.

Neither the text of the AEDPA nor its legislative history offer any express indication of when a document – or, in the terms of § 2244(d)(2), an "application" – should be deemed "filed," properly or otherwise. However, "[w]here Congress uses terms that have accumulated settled meaning . . . a court must infer . . . that Congress means to incorporate the established meanings of these terms." *N.L.R.B. v. Amax Coal Co., a Division of Amax, Inc.*, 453 U.S. 322, 329 (1981). Outside of AEDPA, the meaning of the term "filed" is well established. In *United States v. Lombardo*, 241 U.S. 73 (1916), for example, this Court held that "[a] paper is filed when it is delivered to the proper official and by him received and filed." *Lombardo*, 241 U.S. at 76 (citations omitted). Numerous lower federal courts and state courts have adopted similar definitions. *See, e.g., Milton v. United States*, 105 F.2d

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§ 2263(b)(2) ("petition for post-conviction review or other collateral relief") *with* § 2244(d)(2) ("application for State post-conviction or other collateral review"); *see* § 2255 ("a motion under this section").

253, 255 (5th Cir. 1939) ("The word 'filed' . . . requires of one filing a suit, merely the depositing of the instrument with the custodian for the purpose of being filed"); *Greeson v. Sherman*, 265 F.Supp. 340, 342 (W.D.Va. 1967) (a pleading is filed when it "is delivered to an officer of the court who is authorized to receive it"); *Poetz v. Mix*, 81 A.2d 741, 743 (N.J. 1951) ("In contemplation of law, a paper or pleading is considered as filed when delivered to the proper custodian and received by him to be kept on file").[11] Likewise, most state rules of court contain analogous definitions. *See, e.g.*, 16 Ariz. Rev. Stat. Ann. Rules of Civil Procedure, Rule 5(h) ("The filing of pleadings and other papers with the court as required by these Rules shall be made by filing them with the clerk of the court . . . "); Colorado Rules of Civil Procedure, Rule 5(e) ("Filing With Court Defined. The filing of pleadings and other papers with the court as required by these rules

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[11] *See also, e.g., Freeman v. Giacomo Costa Fu Andrea*, 282 F.Supp. 525, 527 (E.D.Pa. 1968) ("it is settled law that delivery of a pleading to a proper official is sufficient to constitute filing thereof"); *Bituminous Casualty Corp. v. Clements*, 3 So.2d 865, 866 (Fla. 1941) ("Filing a pleading under the modern practice consists simply in placing it in the hands of the proper officer, to be preserved and kept by him in his official custody, as a public record. It is deemed filed when, for that purpose, it is delivered to, and received by, the proper officer who is ordinarily the clerk of court for the county in which the action was brought") (internal citations omitted); *Boland v. Heck*, 65 P.2d 1213, 1214 (Okla. 1937) ("A pleading is 'filed,' within the meaning of the statute, when it is delivered to the court clerk for that purpose . . . ") (internal citations omitted); *People v. Madigan*, 193 N.W. 806, 807 (Mich. 1923) ("It is a well-recognized general rule that a paper or document is filed . . . when it is delivered to and received by the proper officer to be kept on file").

shall be made by filing them with the clerk of the court . . . "); Michigan Court Rules (1985), Rule 2.107(G) ("Filing With Court Defined. The filing of pleadings and other papers with the court as required by these rules must be with the court clerk . . . "); New York CPLR § 304 ("filing shall mean the delivery of the summons with notice, summons and complaint, notice of petition or order to show cause to the clerk of the court in the county in which the action or special proceeding is brought . . . ").

With the meaning of "filed" in hand, understanding the phrase "properly filed" is straightforward. The adverb "properly" is ordinarily understood to describe the doing of an act correctly, or the accomplishment of a task according to expectations. *See* Webster's Deluxe Unabridged Dictionary 1442 (2d ed. 1979) (defining properly, *inter alia*, as "conforming to an accepted standard or to good usage; correct"); The American Heritage College Dictionary 1096 (3d ed. 1993) (defining proper, *inter alia*, as "Called for by rules or conventions; correct"). When the task to be accomplished is the filing of a document, that task is completed "properly" when the established requirements for filing – delivery of the correct document to the designated authority at the right time, *see supra* – have been met. Applying this reasoning to § 2244(d)(2), when the document to be filed is an "application" for state post-conviction relief, that application must be deemed "properly filed" when it has been delivered to the custodian designated to receive it in accordance with the rules governing its acceptance for filing.

This reading of § 2244(d)(2)'s "properly filed application" requirement is supported by nearly all of the federal courts of appeals that have addressed the question. In *Lovasz v. Vaughn*, 134 F.3d 146 (3rd Cir. 1998), for example, the Third Circuit held that "a 'properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing," and that, "[i]f a petitioner complies with these procedural requirements, or other procedural requirements the state imposes, his petition, even a second or successive petition, is 'a properly filed application' for purposes of § 2244(d)(2)." *Lovasz*, 134 F.3d at 148. In addition to the Second Circuit's decision in this case, the Fourth, Fifth, Ninth, and Tenth Circuits have taken similar positions. *See McSheffrey v. Angelone*, No. 98-6519, 1999 WL 89403 at *2 (4th Cir. February 23, 1999) ("a state application is properly filed if it complies with the state procedural requirements for successive collateral attacks on a conviction, such as timeliness and proper place of filing"); *Villegas v. Johnson*, 184 F.3d 467, 473 (5th Cir. 1999) ("a 'properly filed application' for § 2244(d)(2) purposes is one that conforms with a state's applicable procedural filing requirements"); *id.* at 473 n.2 (defining "procedural filing requirements" as "those prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review"); *Dictado v. Ducharme*, 189 F.3d 889, 892 (9th Cir. 1999) (holding that " 'a properly filed application' [is] an application submitted in compliance with the procedural laws of the state in which the application was filed," but that state petition at issue was not properly filed due to noncompliance with state's "rules governing

the time of filing"); *Hoggro v. Boone*, 150 F.3d 1223, 1226 n. 4 (10th Cir. 1998) (untimely appeal of denial of state post-conviction relief not "properly filed").[12]

In addition to its faithfulness to the statutory language, this understanding of § 2244(d)(2) is both clear and workable. By looking only to hard and fast, non-discretionary state filing requirements, the rule Bennett proposes simplifies the state law inquiry that a federal court must undertake in making the threshold timeliness determination. The rule's clarity and ease of application also make it accessible and understandable to all litigants, thereby minimizing the likelihood that petitioners will

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[12] The Eleventh Circuit is the only court of appeals to have taken a contrary position. In *Weekley v. Moore*, 204 F.3d 1083 (11th Cir. 2000), a divided panel found the petitioner's state post-conviction application not "properly filed" because it was successive. In reaching this result, however, the panel majority undertook virtually no analysis of the statutory language, relying instead on a mischaracterization of the Ninth Circuit's decision in *Dictado v. Ducharme*, *supra*, and on the Seventh Circuit's inapposite decision in *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1998) (application for leave to file successive state habeas petition not a "properly filed application" for purposes of § 2244(d)(2)). *Weekley*, 204 F.3d at 1085-1086. A different panel of the Eleventh Circuit and a panel of the Ninth Circuit have also concluded that post-conviction applications which are untimely under a state's limitations period are not "properly filed" within the meaning of § 2244(d)(2). *Webster v. Moore*, 199 F.3d 1256, 1258 (11th Cir. 2000) (third state petition, "which the state trial court dismissed as procedurally barred by the two-year [state] statute of limitations . . . , was not 'properly filed' within the meaning of § 2244(d)(2)"); *Dictado*, 189 F.3d at 892 (state petition that "did not comply with Washington's rules governing the time of filing . . . was not 'properly filed' ").

bypass potentially available state remedies for fear of unwittingly squandering their time under the federal limitations period.[13] This in turn preserves and furthers the

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[13] Some courts of appeals have recognized that sometimes judges, as opposed to non-judicial court personnel, determine whether or not documents will be accepted for filing. Under such a formulation, an application for state post-conviction relief is "properly filed" if it satisfies the prerequisites that must be met before a state court will allow it to be filed and accorded review beyond the essentially ministerial determination whether the applicant has satisfied clearly-defined, non-discretionary state court filing requirements. The Fifth Circuit's recent decision in *Williams v. Cain*, 217 F.3d 303 (5th Cir. 2000), illustrates this rule. In *Williams*, the Fifth Circuit rejected the petitioner's claim of entitlement to tolling for the time during which his untimely application for a supervisory writ to review the denial of state post-conviction relief remained before the Louisiana Supreme Court. Distinguishing the case from *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999), in which a successive Texas state habeas petition was held to be "properly filed," and *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000), in which an untimely Louisiana application for post-conviction relief was deemed "properly filed," the court explained that, in those cases,

> the state court had to make a determination on issues related to the substance of the state applications to determine whether the applications fell within a clearly-defined exception to the time requirements. In this case, by contrast, the question whether a state application . . . for a supervisory writ is timely filed under [the governing state court rule] requires no examination relating to the merits. There was no question that the state application filed here was untimely under state law. The Louisiana Supreme Court did not need to make any determination related to the merits to reach this decision.

Williams, 217 F.3d at 309.

fundamental requirement that, in the interests of federalism and comity, state courts be given the first opportunity to pass on the merits of a prisoner's constitutional claims. *See* § 2254(b) and (c); *see also O'Sullivan v. Boerckel*, 119 S.Ct. 1194 (1999); *Rose v. Lundy*, 455 U.S. 509 (1982).

The state's brief contains several unsupported assertions that the rule Bennett proposes will "thoroughly undermine" or "contravene[ ] the obvious purposes of [§ 2244(d)]." Pet. Br. 30. The first argument is that unless this Court adopts the state's understanding of § 2244(d)(2), prisoners will file countless state petitions in order to extend the federal limitations period. *See* Pet. Br. 37. But non-capital prisoners have no incentive, regardless of the existence of a limitations period, to delay adjudication of their claims for relief, and there is simply no evidence suggesting that a construction of "properly filed application" that is faithful to the statutory language will somehow motivate these prisoners to file abusive applications. *See Rose v. Lundy*, 455 U.S. 509, 520 (1982) ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims"). As for the truly vexatious litigants, they will continue to file in state and federal court without regard to the rules, just as this small handful of prisoners now file procedurally barred claims, and abusive petitions. No construction of "properly filed application" will dissuade them from doing so.

The state's brief also suggests that death-sentenced inmates must be prohibited from repeated filings designed to cheat the executioner. *See* Pet. Br. 36-37. But there is no evidence that death-sentenced prisoners are filing repetitive state applications for the purpose of extending § 2244(d)'s limitations period. In fact, there is

not a single reported decision in which a capital prisoner has attempted to do so, even in the circuits that have had the "time and place of filing" construction of "properly filed application" in place for a substantial period of time. Furthermore, both before and since passage of AEDPA, states have utilized a number of methods to force death-sentenced inmates to proceed through the capital appeals process. Some states, for example, have established strict time limitations of their own, *see, e.g.*, Va. Code § 8.10-654.1 (sixty day limitations period for filing of state habeas petitions in capital cases). Many states employ the straightforward method of setting execution dates to force capital prisoners to initiate federal habeas corpus proceedings in order to obtain a stay of execution. *See In re Stays of Execution in Capital Cases*, 471 S.E.2d 140 (S.C. 1996). Nothing in the rule Bennett proposes would impair the states' ability to utilize these or any other methods to accelerate collateral review in capital cases,[14] and the state's "the sky is falling" arguments provide this Court no legitimate justification for departing from the plain meaning of § 2244(d)(2)'s words. *See Slack v. McDaniel*, 120 S.Ct. 1595, 1606 (2000) ("We reject the State's argument that refusing to give a new meaning to the established term 'second or successive' opens the

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[14] For example, many states use a procedure modeled on Rule 4 of the Rules Governing § 2254 Cases whereby post-conviction petitions are promptly routed to an assignment judge for preliminary screening and, if warranted, summary dismissal. Additionally, in some states, post-conviction petitioners whose repetitive filings have been established to be meritless and abusive are simply barred from filing new challenges.

door to the abuses described"). And, as this Court recognized in *Slack*, in the unlikely event that capital prisoners were to identify a means of exploiting the rule prescribed by the statute, "the State[s] remain[ ] free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings." *Id.*

C. Because Bennett's 1995 application satisfied New York's filing requirements, it was and remains "a properly filed application for State post-conviction . . . review."

New York law has no specific requirements for the filing of a Motion to Vacate Judgment pursuant to CPL §§ 440.10 or 440.30. But New York law does provide a clear, unambiguous definition of "filed." For example, § 304 of the New York Civil Practice Law and Rules, entitled "Method of commencing action or special proceeding," provides that "filing shall mean the delivery of the summons with notice, summons and complaint, notice of petition or order to show cause to the clerk of the court in the county in which the action or special proceeding is brought. . . . " Similarly, § 202.5 of the Uniform Rules for the New York State Trial Courts, entitled "Papers Filed in Court," provides that "[a]ll papers for . . . consideration of the court shall be presented to the clerk of the trial court in the appropriate courtroom or clerk's office . . . , except that where the clerk is unavailable or the judge so directs, papers may be submitted to the judge and a copy filed with the clerk at the first available opportunity." N.Y. Ct. Rules § 202.5(b) (subtitled "Submission of papers to judge"). New York decisional law also adheres to the commonly understood

meaning of "filing." *See, e.g., Application of Bd. of Sup'rs of Chenango County for Appointment of Com'rs of Appraisal in Condemnation Proceeding*, 261 N.Y.S. 76, 84 (N.Y.Co.Ct. 1932) (following the "general trend of judicial decisions," described as being "to the effect that the delivery of a paper to an official, for the purposes of safe-keeping and as a public record, constitutes the act of 'filing' "); *see also id. quoting, inter alia, United States v. Lombardo*, 241 U. S. 73, 76 (1916); *Matter of Norton*, 53 N. Y. S. 924 (N.Y.Co.Ct. 1898).

It is undisputed that Bennett complied with New York's requirements for properly filing his 1995 application. There has never been any suggestion, either before this Court or during the proceedings in the lower courts, that Bennett failed to deliver his application to the correct custodian, or that the state court declined to accept the application for filing. The Second Circuit was therefore correct to conclude that Bennett's 1995 application was a "properly filed application" within the meaning of § 2244(d)(2). Furthermore, because that application has yet to be decided in the manner prescribed by New York law, Bennett's time for filing his petition for federal habeas corpus relief has not begun to run. In short, it was – and remains – a properly filed application for state post-conviction review.

D. The availability of tolling under 28 U.S.C. § 2244(d)(2) does not depend on the procedural default status of the individual claims presented in a prisoner's application for post-conviction relief.

The state's brief asserts that § 2244(d)(2)'s "properly filed application" language really means "application raising claims not mandatorily procedurally barred under state law." *See* Pet. Br. 23. We will return to the issue of what it means to say "mandatorily procedurally barred" in section E., infra, but we begin by demonstrating that the state's reading of the relevant statutory language – whose origins clearly lie not in the text of the statute, but in what the state contends Congress "must have meant" – amounts to a dramatic, unsupportable redrafting of § 2244(d)(2).

The fundamental flaw in the state's rule is that it ignores Congress' use of the word "application" in the statutory text, treating it instead as a synonym for "claim." Misreading "application" in this manner is the only way to facilitate use of the procedural default doctrine as the test for whether an application is "properly filed." Procedural default is a doctrine of issue, or claim, preclusion, not a wholesale bar to the "application" in which potentially barred claims are brought before a court.[15] Thus, for the state's rule to even appear marginally workable and consistent with existing habeas law,

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[15] *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999), *citing Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991); *Engle v. Isaac*, 456 U.S. 107, 125-126, n.28 (1982) ("Boerckel's failure to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of

the distinction between "application," as Congress wrote it, and "claim," as the state reads it, must be ignored. Discounting the significance of "application" for the sake of this ill-fitting procedural default theory results in similar errors with regard to the word "filed," which the state treats as "presented," and the word "properly," to which the state attaches unwarranted and unnatural meanings.

As discussed in detail *supra* at 13-15, in the context of modern procedures for collateral review of state criminal convictions, the word "application" is commonly understood to refer to a document or written pleading in which a prisoner sets forth his claims for relief. That Congress had this definition in mind – and that it appreciated the distinction between an "application" and a "claim" – when it drafted the AEDPA is confirmed by the language of § 2244(b)(1) and (2), both of which refer to "[a] *claim* presented in a second or successive habeas corpus *application.*" (emphasis added).

Congress' understanding of the distinction between an application and a claim, and its decision to use "application," not "claim," as the subject of § 2244(d)(2)'s "properly filed" phrase, completely undermine the "mandatory procedural bar" rule advocated by the state. Claims are subject to rejection under the doctrine of procedural default, applications are not. Moreover, while

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those claims"); *Gray v. Netherland*, 518 U.S. 152, 161 (1996) ("Petitioner's failure to raise his *Brady* claim in state court implicates the requirements in habeas of exhaustion and procedural default"); *Harris v. Reed*, 489 U.S. 255, 263 (1989) ("procedural default does not bar consideration of a federal claim . . . unless . . . ").

Congress is presumed under the rules of statutory construction to be aware of this basic principle of habeas jurisprudence, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation"), reliance on that presumption here is not necessary. Congress expressly indicated its familiarity with the distinction between review on the merits and disposition on other grounds in at least two of the AEDPA's provisions: In § 2254(d), Congress imposed limits on federal courts' ability to grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings . . . " Similarly, in § 2264(a), Congress limited federal habeas review in capital cases from qualifying states to consideration of "a claim or claims that have been raised and decided on the merits in the State courts . . . " Given Congress' demonstrated awareness of the difference between a "claim" and an "application," and of the applicability of procedural default principles to the former but not the latter, the state's "mandatory procedural bar" rule simply cannot be squared with Congress' selection of "application" as the subject of § 2244(d)(2)'s "properly filed" phrase.

The discord created by ignoring the settled meaning of "application" extends to the word "filed." If the state's rule is correct, "filed" actually means "presented." But as described *supra* at 15-17, the verb "file" describes the act of delivering a document to a designated authority to be placed in the court records. When referring to the procedural default status of a habeas petitioner's claim, however, this Court has consistently spoken in terms of the claim's *presentation*. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (when prisoner has not "properly

presented his claims to the state courts . . . [he] has procedurally defaulted his claims"); *Gray v. Netherland*, 518 U.S. 152, 159 (1996) (describing allegation that petitioner's "*Brady* subclaim had not been *presented* to the state courts on direct appeal or in state habeas corpus proceedings, and was thus procedurally barred"); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (procedural default occurs when "a habeas petitioner . . . has failed to meet the State's procedural requirements for *presenting* his federal claims"); *Dugger v. Adams*, 489 U.S. 401, 419 (1989) (observing that state court "did not invoke procedural default as a basis for decision, notwithstanding the prisoner's failure to *present* his . . . claim on direct appeal") (all emphases added). Here again, Congress' grasp of the ordinary usage of the terms "filed" and "presented" is demonstrated in the AEDPA, which contains repeated references to the *filing* of *applications*, and the *presentation* of *claims*. *See, e.g.*, § 2244(b)(3)(A) ("Before a second or successive *application* permitted by this section is *filed*"); § 2263(a) ("Any *application* under this chapter for habeas corpus relief under section 2254 must be *filed* . . . "); § 2244(b)(1) ("A *claim presented* in a second or successive habeas corpus *application*"); § 2244(b)(4) ("any *claim presented* in a second or successive *application*"); § 2244(d)(1)(D) ("the factual predicate of the *claim or claims presented*"). Thus, just as with "application," Congress' selection of "filed," rather than "presented," for use in § 2244(d)(2) conclusively demonstrates that it was not speaking of procedural default.[16]

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[16] That "properly filed application" does not mean "application raising claims that are not procedurally barred" is

The state's contortions of the statutory language continue with its treatment of the adverb "properly" as an all-purpose statutory wild card, into which it reads a range of potential procedural stumbling blocks to merits review of a prisoner's claims. It is unclear from the brief whether the state seeks to exclude all applications that a state court could not "hear on the merits under state procedural rules," Pet. Br. 22, or "only" those applications containing claims "that are mandatorily procedurally barred under state law," Pet. Br. 28. Either view, however, gives content to the word "properly" that cannot be justified. *See Consumer Product Safety Commission, supra* ("[a]bsent a *clearly expressed legislative intention to the contrary,* th[e] language [of a statute] must ordinarily be regarded as conclusive") (emphasis added).

The state attempts to avoid the plain meaning of the adverb "properly" in two ways: first, by divorcing it from the verb it modifies in § 2244(d)(2), and second, by reference to a treatise and a law review article suggesting that the phrase "properly filed" is ambiguous. *See* Pet. Br. 29. Using the first method, the state concentrates on a dictionary definition of "the word 'proper' " as "ordinarily denot[ing] 'strictly accurate' or 'correct,' " and contends

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confirmed by the only federal court of appeals to have squarely addressed the question. In *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999), the Fifth Circuit observed that "Congress enacted AEDPA against a backdrop of federal habeas law dealing with procedurally barred claims. [citations omitted] . . . . That Congress nonetheless chose not to address successive state petitions or procedurally barred claims in § 2244(d)(2) convinces us all the more that we ought not assume an overly broad meaning of 'properly filed.' " *Villegas*, 184 F.3d at 470.

that a "post-conviction application that fails to comply with mandatory state procedural rules cannot" satisfy this definition. Pet. Br. 29. But this overlooks the key fact that Congress did not use the adjective "proper" to qualify the noun "application;" rather, it used the adverb "properly" to modify the verb "filed." *See* Webster's Deluxe Unabridged Dictionary 28 (2d ed. 1979) (defining "adverb" as "a word used to modify a verb, adjective, or other adverb by expressing time, place, manner, degree, cause, etc."). As discussed *supra* at 17, giving the words "properly" and "filed" their ordinary, common meaning, and reading them in the context of § 2244(d)(2)'s language, the question they combine to propound is simply whether or not the prisoner has accomplished the delivery of his application to the custodian designated to receive it in accordance with the rules governing its acceptance for filing.[17]

The state's alternative means of avoiding the plain meaning of the statutory language is to urge that "there is, at the very least, sufficient ambiguity in the term 'properly' to justify an inquiry into Congress's objectives in enacting the statutory provisions." Pet. Br. 29 (citing Liebman & Hertz, § 5.1b n.64, at 236; Tushnet & Yakle

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[17] The state's other shallow foray into the meaning of "properly" is equally misguided, this time acknowledging that Congress used "properly," not "proper," in § 2244(d)(2), but replacing "filed" with "presented." *See* Pet. Br. at 29 *citing O'Sullivan v. Boerckel*, 526 U.S. at 848; *Harris v. Reed*, 489 U.S. 255, 265 (1989) ("this Court has often used the term 'properly' in discussing the exhaustion and procedural default doctrines to refer to claims presented to state courts in accordance with state procedural rules").

[sic] at 30). But merely asserting that a word is ambiguous does not make it so, and the state's complete failure even to attempt an analysis of the language of § 2244(d)(2) using the methods this Court has established renders its assertion hollow.

More importantly, as we have demonstrated, straightforward application of this Court's rules of statutory construction reveals no genuine ambiguity in what Congress meant by the phrase "properly filed." Resorting to the generalized arguments on legislative intent that occupy the majority of the state's brief is therefore unnecessary. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 116 (1993) (Thomas, J., joined by O'Connor and Kennedy, JJ., dissenting) ("there is no need to resort to such general understandings of the policy behind a statute when the language suggests a contrary meaning"); *cf Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 446 (1972) ("If the language of a statute is clear and unambiguous there is no occasion to resort to legislative history. Nor can such history, however illuminating it may seem, be relied upon to contradict, or dilute, or add unspecified conditions to statutory language which is perfectly clear"); *United States v. Oregon*, 366 U.S. 643, 648 (1961) ("Having concluded that the provisions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act").

Reading "properly," as the state does, to mean "presenting claims eligible for merits review under state law" also ignores the fact that when Congress wanted to limit federal habeas review to claims that received merits review in the state courts, it did so expressly. In § 2254(d),

for example, Congress spoke specifically about "any claim that was adjudicated on the merits in State court proceedings . . . " Congress spoke with equal clarity in § 2264(a), establishing that, in a qualifying capital case, "the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts . . . " Given Congress' demonstrated ability to draft statutory language focusing on claims that received merits review in state court proceedings, its failure to use such language in § 2244(d)(2) cannot be ignored in favor what the state contends Congress must have meant. *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 111 S.Ct. 840, 846-47 (1991), *quoting Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300 (1983) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ") (internal quotation marks omitted); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 305-306 (1993) (Thomas, J., dissenting, joined by Blackmun and O'Connor, JJ.) ("Courts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do").

E. Defining "properly filed application" as "application raising claims that are not 'mandatorily procedurally barred' " affords prisoners no meaningful guidance as to the types of claims that will result in tolling under § 2244(d)(2).

Even if the statutory language could support the state's "mandatory procedural bar" standard, that

standard would still be totally unworkable. The state's brief never explains what "mandatory procedural bar" means, undoubtedly because trying to do so would demonstrate the inherent problems with the suggested rule. First, there are, in fact, virtually no mandatory procedural bars. Virtually all state procedural default rules contain exceptions of some sort – *e.g.*, fundamental or plain error, cause and prejudice, miscarriage of justice, state interference, ineffective assistance of counsel, retroactive new law, newly discovered evidence – and are therefore not "mandatory." And the few barriers to state post-conviction review that are genuinely "mandatory," such as a lack of jurisdiction to entertain a prisoner's claims, or a court order barring a vexatious litigant from filing new challenges, are not true "procedural bars." Thus, if read literally, the rule would apply to almost no one.

An examination of the state's brief reveals that, despite the talismanic invocation of "mandatory procedural bar," the state is in fact suggesting that an application is not "properly filed" if it contains procedurally defaulted claims. But even using this standard, the reality is that the overwhelming majority of prisoners would fit within the state's own exceptions. According to the state's brief, "[i]f a petitioner colorably invokes an exception to the state's procedural bar, or if the state courts regularly overlook the procedural bar in order to review claims such as the petitioner's, the ambiguity should be resolved in favor of the petitioner." Pet. Br. 32; *see also* Pet. Br. 34 ("Any legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling"). It is the rare case in which a prisoner does not "colorably invoke" an exception to a state's procedural bar defenses.

While the porousness of the state's rule would be attractive to many habeas petitioners, chaos would be the inevitable result. Prisoners uncertain whether their claims may be deemed procedurally barred, or whether a state court would find their arguments in support of merits review "colorable," would bypass state collateral review out of a legitimate fear that the time spent in state court would not toll the limitations period if their claims are deemed procedurally barred. The state's brief suggests that the solution to this problem is simply to rely on federal district courts to dismiss petitions which are arguably unexhausted, which would in turn "assure[ ] [the petitioner] that he or she will obtain the benefit of tolling because there will already be a determination on the facts of petitioner's case that the state proceeding is necessary for exhaustion . . . " Pet. Br. 35. But that is no answer. Such a scheme would invert the exhaustion requirement by putting federal courts in the position of having to decide in the first instance whether a state court would consider a claim on the merits without the benefit of any type of state court order addressing the issue. Furthermore, it would go directly against the obvious purpose of § 2254(b), and would flout this Court's "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Rose v. Lundy*, 455 U.S. 509, 520 (1982); *see also id.* at 518-519 ("A rigorously enforced total exhaustion rule will encourage state prisoners to *seek full relief first from the state courts*, thus giving those courts the *first* opportunity to review all claims . . . ") (emphasis added). It is also

impossible to conceive of how such a backtracking system could possibly serve the state's interest in eliminating "repetitious litigation that . . . causes years of delay." Pet. Br. 37.

In addition to leaving prisoners to anxiously "wait and see" whether the state courts will reach the merits of their claims, or at least find their arguments for doing so "colorable," the state's formulation raises, but does not answer, a host of other troubling questions. For example:

- What differentiates a "mandatory procedural bar" from a non-mandatory procedural bar?
- What constitutes an "arguably legitimate attempt to exhaust state remedies"?
- What constitutes a "colorable" invocation of an exception to a state procedural bar?
- What proportion of the claims presented in a state court application must be colorably eligible for merits review in order to qualify as "properly filed"? Is a single non-barred claim enough?
- Should a state application raising procedurally barred claims nevertheless be deemed "properly filed" if, after the state raises procedural bar as an affirmative defense, the applicant comes forward with a colorable argument that one or more of his claims fits within an exception to the bar? If so, does tolling under § 2244(d)(2) begin at the time the applicant's response is filed, or should it relate back to the filing of the initial application?
- To accommodate the fact that procedural default is assessed claim-by-claim, should

"properly filed," and therefore tolling under § 2244(d)(2), also be measured claim-by-claim, notwithstanding the statute's express reference to the filing status of the "application"?

- If tolling under § 2244(d)(2) is to be measured claim-by-claim, will a prisoner be required to file a federal habeas petition raising direct appeal claims if his state collateral proceedings extend beyond one year of the date on which his direct appeal becomes final?

- If tolling under § 2244(d)(2) is to be measured claim-by-claim, must the limitations period be calculated separately for claims included in a state application by way of amendment subsequent to the filing of the initial application?

- Do federal district courts have the authority, for purposes of determining the timeliness of a habeas corpus petition, to take a fresh look at a state court's finding that a claim was procedurally barred from state collateral review, or must they take the state court's determination at face value?

- If a petitioner whose claim was found to be procedurally defaulted by a state court is nevertheless able to establish cause and prejudice or a miscarriage of justice in federal court, would the petitioner still be deprived of tolling under § 2244(d)(2)?

In short, the state's proposed rule would create an entirely new and complex field of habeas corpus doctrine, which would undoubtedly require this Court to revisit

§ 2244(d)(2) repeatedly in the future. In the meantime, the federal courts would remain paradoxically mired in confusing, inefficient and unnecessary case-by-case litigation over the operation of a single statutory provision whose purpose was to accelerate, not complicate, collateral challenges to state court convictions. *Cf Wilson v. Garcia*, 471 U.S. 261, 272 (1985) ("The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983"). This is clearly not what Congress intended. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available")

F. The claims in Bennett's 1995 application were not "mandatorily procedurally barred" under New York law, and Bennett is therefore entitled to tolling even under the state's construction of § 2244(d)(2).

Bennett's 1995 state court application presented three claims for relief: that his rights were violated when the trial court prevented him from calling a witness in his defense; that the prosecutor committed misconduct; and that his right to be present at all material stages of trial

was violated.[18] The only evidence of how the state post-conviction court resolved these claims is its four-word oral ruling: "The motion is denied." JA 143. It is impossible to ascertain from that ruling which of the state's procedural and substantive defenses, if any, the state court relied upon to deny relief. Clearly, this would not qualify as a procedural default holding under any of this Court's decisions. *See Coleman v. Thompson*, 501 U.S. 722 (1991) ("[state] court's explicit grant of a dismissal motion based solely on procedural grounds" justified reading summary state court order as establishing procedural default); *Harris v. Reed*, 489 U.S. 255, 263 (1989) ("a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar").

None of the procedural grounds on which the state defended against Bennett's claims is "mandatory," in the sense of requiring automatic dismissal without substantive consideration. In opposition to Bennett's first two claims – preclusion of defense testimony and prosecutorial misconduct – the state relied in part on CPL § 440.10(2)(a), which requires denial of relief when a claim has been previously raised and decided on direct

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[18] In his 1995 application, Bennett clearly indicated that he filed the application in order to exhaust state remedies as required by § 2254(b). *See* JA 114. The state's brief does not explain why its concession that "[a]ny legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling," Pet. Br. 34, should not apply to Bennett.

appeal "*unless* since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue[.]" (emphasis added). Because the statute contains an express exception, the requirement that relief be denied cannot and does not become effective, or in the state's words, "mandatory," until the reviewing court has first determined that resolution of the claim is not governed by a retroactive change in governing law.[19] In addition to § 440.10(2)(a), the state also defended against Bennett's prosecutorial misconduct claim on the merits, arguing that Bennett "failed to establish" prejudice and citing the state appellate court's earlier finding that the trial court's erroneous preclusion of defense testimony was harmless.[20] JA 128. Here again, the

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[19] In its brief, the state faults Bennett for never having "established that there had been any retroactively effective change in the law." Pet. Br. 44; *see also id.* at n.10 (contending Bennett's less than artful pleading placed his first two claims outside the statutory exception). The state *may* be correct; but the important point for purposes of applying the state's own interpretation of § 2244(d)(2) is that whether or not Bennett sufficiently invoked § 440.10(2)(a)'s exception was a decision that the state *court* had to make after consideration of the facts and arguments presented to it. Until then, there was nothing "mandatory" about the applicability of § 440.10(2)(a)'s denial requirement.

[20] Specifically, the state argued: "Furthermore, defendant's second claim cannot possibly succeed in view of the Appellate Division's ruling on that issue because, even if the prosecutor did act in bad faith in asking for preclusion – a fact that defendant has failed to establish – that fact would only justify vacatur of defendant's conviction if it actually prejudiced defendant. Since the Appellate Division already concluded that the preclusion was harmless beyond a reasonable doubt, any claim in this motion that is based upon the preclusion of Mahamed's testimony must be summarily denied." JA 128.

state's adversarial contentions that Bennett had not alleged facts sufficient to warrant relief on the merits, and that the appellate court's finding of harmlessness on a different but related issue precluded relief, are not properly characterized as "procedural bars," "mandatory" or otherwise.[21]

The state's defenses to Bennett's third claim – that his right to be present at all material stages of the proceedings was violated – exacerbate the ambiguity in the state court's oral denial.[22] The state defended against this

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[21] The state's brief in this Court raises a new defense to Bennett's prosecutorial misconduct claim, arguing that because the "claim was based on the trial record and could have been made on [direct] appeal," and because "Bennett never sought to invoke the 'unjustifiable failure' language of [§ 440.10(2)(c)] . . . this issue too was mandatorily procedurally barred . . . " Pet. Br. 44. Apart from the fact that this defense appears nowhere in the state's response to Bennett's prosecutorial misconduct claim submitted in state court, the state's reliance on it now actually undercuts its own argument: just like subdivision (a) of § 440.10(2), subdivision (c) contains an exception – justifiable failure to raise a claim on direct appeal – that prevents automatic denial of a claim.

[22] The state's brief asserts that Bennett's third claim was based only on state law, presumably to suggest that this fact, were it correct, would somehow render that claim irrelevant to the tolling analysis under § 2244(d)(2). While the New York Court Appeals' decision in *People v. Favor*, 82 N.Y.2d 254 (N.Y. 1993), does indicate that its decision in that case and in *People v. Dokes*, 79 N.Y.2d 656 (N.Y. 1992), focused on state law, nothing in those decisions foreclosed the argument that a defendant's absence from a *Sandoval* hearing would violate the federal Constitution, as well as New York law. Furthermore, even assuming Bennett's third claim is properly characterized as being confined to state law, nothing in § 2244(d)(2) suggests

claim on five grounds; some of which were procedural, others were substantive. First, the state invoked CPL § 440.30(4)(c), and urged that the court "should" deny the claim because Bennett's allegation was "conclusively refuted by documentary proof." JA 129. But CPL § 440.30(4)(c) provides that, "Upon considering the *merits* of the motion, the court *may* deny it without conducting a hearing if: . . . (c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof[.]" (emphasis added). The plain language of the statute thus makes clear both that the post-conviction court is required to "examin[e] . . . the merits of the claim," and that, after doing so, it "may deny" relief.[23] This is not a procedural bar at all.

The state also relied on CPL § 440.10(2)(c), which prohibits collateral relief on a ground that could have been raised on direct appeal if "no such appellate review or determination occurred owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." As with

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that, in order to qualify as "properly filed," an application must contain exclusively federal constitutional claims.

[23] The significance of the distinction between "may" and "must" in the New York provisions governing a post-conviction court's authority to deny relief is not lost on the state. In its brief, the state emphasizes that "the language of the two procedural bars at issue is mandatory: the statutory bar requires that 'the court *must* deny a motion to vacate a judgment when' the conditions are met." Pet. Br. 48-49 (citation omitted) (emphasis by state). Perhaps it is for this reason that the state focuses only on the provisions that include "must," without acknowledging its reliance in state court on the provisions that say "may."

the state's other statutory defenses, this provision is not automatic or "mandatory," but instead requires a finding by the state court first that the direct appeal contained facts sufficient to permit adjudication of the claim, and second that the prisoner's failure to raise the claim on direct appeal was "unjustifiable." And while the state court may have resolved both of these issues against Bennett, whether it actually did so simply cannot be determined from its four-word oral ruling.

The state's third and fourth defenses were also based on statutory provisions that allow, but do not require, the state court to deny relief. Invoking subdivisions (a) and (c) of CPL § 440.10(3),[24] the state contended respectively that "even if the record was not sufficient to permit

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[24] CPL § 440.10(3) provides in relevant part:

> Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:
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> (a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. . . . ; or
>
> * * *
>
> (c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

review on direct appeal, [Bennett] could have caused such facts to appear on the record," and that "even if this is a purely off-the-record claim, it is still procedurally barred because [Bennett] could have raised this issue in his original 440 motion, but unjustifiably failed to do so." Apart from the fact that the introductory sentence of CPL § 440.10(3) indicates that the court "may deny" claims meeting certain conditions, a review of the specific subdivisions relied upon by the state reveals once again that the court's discretion to deny Bennett's claims could be triggered only if it first made specific findings relating to Bennett's conduct in earlier proceedings. Subdivision (a) allows the court to deny relief only after finding that a defendant exercising "due diligence" could have "readily" caused the relevant facts to appear on the record, and that the defendant's failure to ensure inclusion of the facts was "unjustifiabl[e]." And subdivision (c) permits the court to deny relief on a second or successive application only after finding that the applicant "was in a position adequately to raise the ground or issue" in a previous application. Again, the state court may (or may not) have resolved these inquiries against Bennett. But if it did, the court did not say so, thus making it impossible to characterize Bennett's application as "mandatorily procedurally barred."

Finally, the state defended against Bennett's third claim on the merits. *See* JA 130 (Affirmation in Opposition to Defendant's Motion to Vacate Judgment: "[Bennett's] claim that his right to be present at his *Sandoval* hearing was violated . . . is meritless"). It goes without saying that if the state court relied on this argument to support its

denial of relief, it did not find Bennett's third claim "mandatorily procedurally barred."

In sum, every defense raised by the state to the claims presented in Bennett's 1995 application required some level of substantive review before the state court would have been permitted to deny relief under state law. While the state, like other litigants, may have believed its arguments to be persuasive and strong, that belief is simply not enough to make the state's arguments dispositive of the case. Because the state court was required by unambiguous state law to make specific findings with respect to the substance of each of the state's defenses, it cannot legitimately be said that the claims in Bennett's 1995 application were "mandatorily procedurally barred."

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully Submitted,

ALAN S. FUTERFAS*
ELLEN B. RESNICK
LAW OFFICES OF
ALAN S. FUTERFAS
260 Madison Avenue
New York, NY 10016
(212) 684-8400

JOHN H. BLUME
Cornell Law School
110 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

KEIR M. WEYBLE
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

Counsel for Respondent

**Counsel of Record*